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SERVICE DATE - AUGUST 24, 1999

SURFACE TRANSPORTATION BOARD

DECISION AND NOTICE OF INTERIM TRAIL USE OR ABANDONMENT

STB Docket No. AB-6 (Sub-No. 383X)

THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY--
ABANDONMENT EXEMPTION--IN WASHINGTON COUNTY, OR

Decided: August 19, 1999

The Burlington Northern and Santa Fe Railway Company (BNSF) has filed a notice of exemption under 49 CFR 1152 Subpart F--Exempt Abandonments to abandon a 0.38-mile line of its railroad between milepost 27.84 and milepost 28.22 near Banks, in Washington County, OR. Notice of the exemption was served and published in the Federal Register on July 26, 1999 (64 FR 40412-13). The exemption is scheduled to become effective on August 25, 1999.

The Board's Section of Environmental Analysis (SEA) served an environmental assessment (EA) in this proceeding on July 30, 1999. In the EA, SEA indicates that the right-of-way may be suitable for other public use following abandonment. By petition filed July 19, 1999, the Oregon Parks and Recreation Department (OPRD) filed a request for issuance of a notice of interim trail use (NITU) for the entire line under the National Trails System Act, 16 U.S.C. 1247(d) (Trails Act), and for a public use condition so that it can negotiate with BNSF for acquisition of the right-of-way for use as a recreational trail.

OPRD requests that BNSF be prohibited from disposing of the corridor, other than the tracks, ties and signal equipment, except for public use on reasonable terms, and that BNSF be barred from removing or destroying any trail-related structures, such as bridges, trestles, culverts and tunnels, for a 180-day period from the effective date of the abandonment exemption. OPRD states that it needs the full 180-day period because it has not had time to commence negotiations with BNSF. OPRD submitted a statement indicating its willingness to assume financial responsibility for the management of, for any legal liability arising out of the transfer or use of (unless the user is immune from liability, in which case it need only indemnify the railroad against any potential liability), and for payment of taxes for, the right-of-way, as required at 49 CFR 1152.29, and acknowledged that the use of the right-of-way for trail purposes is subject to future reactivation for rail service. By reply filed August 5, 1999, BNSF indicated its willingness to negotiate with OPRD for interim trail use.

OPRD's request complies with the requirements of 49 CFR 1152.29 and BNSF is willing to negotiate. Therefore, a NITU will be issued. The parties may negotiate an agreement during the 180-day period prescribed below. If the parties reach a mutually acceptable final agreement, no further Board action is necessary. If no agreement is reached within 180 days, BNSF may fully abandon the line. See 49 CFR 1152.29(d)(1). Use of the right-of-way for trail purposes is subject to restoration for railroad purposes.

As an alternative to interim trail use under the Trails Act, the right-of-way may be acquired for public use as a trail under 49 U.S.C. 10905. See Rail Abandonments--Use of Rights-of-Way As Trails, 2 I.C.C.2d 591, 609 (1986). Under section 10905, the Board may prohibit the disposal of rail properties that are proposed to be abandoned and are appropriate for public purposes for a period of not more than 180 days after the effective date of the decision approving or exempting the abandonment.

To justify a public use condition, a party must set forth: (i) the condition sought; (ii) the public importance of the condition; (iii) the period of time for which the condition would be effective; and (iv) justification for the imposition of the period of time requested. See 49 CFR 1152.28(a)(2). OPRD has satisfied these requirements and, therefore, a 180-day public use condition will be imposed commencing with the effective date of the exemption.

When the need for interim trail use/rail banking and public use is shown, it is the Board's policy to impose both conditions concurrently, subject to the execution of a trail use agreement. If a trail use agreement is reached on a portion of the right-of-way, BNSF must keep the remaining right-of-way intact for the remainder of the 180-day period to permit public use negotiations. Also, a public use condition is not imposed for the benefit of any one potential purchaser, but rather to provide an opportunity for any interested person to acquire the right-of-way that has been found suitable for public purposes, including trail use. Therefore, with respect to the public use condition, BNSF is not required to deal exclusively with OPRD, but may engage in negotiations with other interested persons.

As conditioned, this decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. This proceeding is reopened.
2. Upon reconsideration, the notice of exemption served and published in the Federal Register on July 26, 1999, exempting the abandonment of the line described above is modified to the extent necessary to implement interim trail use/rail banking as set forth below, subject to the condition that BNSF keep intact the right-of-way underling the track, including bridges, trestles, culverts and tunnels (but not track or track materials, for a period of 180 days from the August 25, 1999 effective date (until February 21, 2000), to enable any state or local government agency, or other interested person to negotiate the acquisition of the line for public use. If an interim trail use/rail banking agreement is executed before the 180-day period specified above, the public use condition will expire to the extent the trail use/rail banking agreement covers the same line.
3. If an interim trail use/rail banking agreement is reached, it must require the trail user to assume for the term of the agreement, full responsibility for management of, for any legal liability

arising out of the transfer or use of (unless the user is immune from liability, in which case it need only indemnify the railroad against any potential liability), and for the payment of any and all taxes that may be levied or assessed against the right-of-way.

4. Interim trail use/rail banking is subject to the future restoration of rail service and to the user's continuing to meet the financial obligation for the right-of-way.

5. If interim trail use is implemented, and subsequently the user intends to terminate trail use, it must send the Board a copy of this decision and notice and request that it be vacated on a specified date.

6. If an agreement for interim trail use/rail banking is reached by February 21, 2000, interim trail use may be implemented. If no agreement is reached by that time, BNSF may fully abandon the line.

7. This decision is effective on its service date.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams
Secretary